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IN THE

Supreme Court of the United States

October Term, 1956

No. 462

ABRAM FLAXER, *Petitioner,*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioner prays for a writ of certiorari to review a judgment of the United States Court of Appeals for the District of Columbia Circuit which affirmed a judgment of the United States District Court for the District of Columbia convicting the petitioner of violating 2 U.S. Code, sec. 192.

OPINIONS BELOW

The opinion of the trial court denying petitioner's motion for a judgment of acquittal is reported at 112 F. Supp. 669 and is reproduced at R. 14-20. The case

was first heard below by a regular three-judge division composed of Chief Judge Edgerton and Judges Miller and Fahy. Before the division announced a decision, the full Court of Appeals on its own motion ordered reargument before the court in banc. The in banc court affirmed by a vote of four to three, with Chief Judge Edgerton and Judges Bazelon and Fahy dissenting. The opinion of the court below has not as yet been reported. It appears at R. 98-116 and is attached hereto as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on June 21, 1956 (R. 97, Appendix A, infra), and a petition for rehearing was denied on July 30, 1956 (R. 122). By order of Mr. Justice Black, the time for filing a petition for certiorari was extended to September 28, 1956. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the conviction of a union president for contempt of Congress for failure to produce to a Congressional subcommittee the names and addresses of the 35,000 members of his labor union may be sustained, there being no evidence of the purpose for which the subcommittee desired the names or of the use to which the names would be put, no other evidence of pertinency to a matter under inquiry, and no showing of a legislative purpose for the demand for the names.

2. Whether it was permissible for the court below to find pertinency and a legislative purpose in the absence of evidence on the subject, by conjecturing

that the subcommittee desired the names in order to check them "against a list of subversives to determine the extent of infiltration into the union."

3. Whether the purpose conjectured by the court below is a valid legislative purpose and consistent with the Constitution.

4. Whether under the Senate rules and the Senate resolution establishing the subcommittee, one member of the subcommittee constituted a quorum for the purpose of ruling on objections to the validity of a subpoena duces tecum to produce the names and addresses of 35,000 members of a labor union.

5. Whether the petitioner was guilty of a wilful default for the failure to produce these membership lists at a hearing at the conclusion of which he was directed to produce the records not then and there, but within ten days.

STATUTE AND RESOLUTIONS INVOLVED

Rev. Stat. § 102, as amended by c. 594, Act of June 22, 1938, 52 Stat. 942, 2 U. S. C. § 192 provides:

> "Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 or less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months."

Senate Resolution 366, 81st Cong., 2d Sess., established the Subcommittee on Internal Security of the Committee on the Judiciary of the United States Senate and authorized that subcommittee to make a "study and investigation" of the following:

> "(1) The administration, operation and enforcement of the Internal Security Act of 1950;
>
> (2) The administration, operation and enforcement of other laws relating to espionage, sabotage, and the protection of the internal security of the United States; and
>
> (3) The extent, nature and effects of subversive activities in the United States; its territories and possessions, including, but not limited to espionage, sabotage, and infiltration by persons who are or may be under the domination of the foreign government or organization controlling the world Communist movement or any other movement seeking to overthrow the Government of the United States by force and violence."

Section 2 of the Resolution provides as follows:

> "A majority of the members of the committee, or duly authorized subcommittee thereof, shall constitute a quorum for the transaction of business, except that a lesser number, to be fixed by the committee, or by such subcommittee, shall constitute a quorum for the purpose of administering oaths and taking sworn testimony."

Senate Resolution 180, 81st Cong., 2d Sess. amended subsection (3) of Rule XXV of the Standing Rules of the Senate, to read as follows:

> "3(a) Except as provided in paragraph (b) of this subsection, each standing committee, and each subcommittee of any such committee, is author-

ized to fix the number of its members (but not less than one third of its entire membership) who shall constitute a quorum thereof for the transaction of such business as may be considered by said committee subject to the provisions of Section 133(d) of the Legislative Reorganization Act of 1946.

(b) Each standing committee, and each subcommittee of any such committee, is authorized to fix a lesser number than one third of its entire membership who shall constitute a quorum thereof for the purpose of taking sworn testimony."

The new matter introduced by Resolution 180 is subparagraph (b).

STATEMENT OF THE CASE

The two-count indictment charged that the petitioner had failed to comply with a subpoena to produce certain records of the United Public Workers of America (herein called the Union) before the Subcommittee on Internal Security of the Committee on the Judiciary of the United States Senate (herein called the Subcommittee). The first count of the indictment charged that the petitioner had refused to produce on October 5, 1951, the records of the Union showing "names and addresses for all members who are employed by the Federal Government of the United States of America." The second count charged that the petitioner had refused to produce on that date the records of the Union showing the "names and addresses of all members who are employed by any state, county, or municipal government located anywhere within the United States of America" (R. 2-3). The petitioner was convicted on both counts (R. 94).

On September 19, 1951, the petitioner, then president of the Union, was served with a subpoena which reads in part as follows (R. 63):

> "Pursuant to lawful authority, you are hereby commanded to appear before the Subcommittee on Internal Security of the Committee on the Judiciary of the Senate of the United States, on Friday, October 5, 1951, at 10 o'clock a.m., at their committee room, 424 Senate Office Building, Washington, D. C., then and there to testify what you may know relative to the subject matter under consideration by said committee. You are commanded to produce and bring with you such records of the union known as United Professional Workers of America, which records will show the total amount of funds now in possession of the union; the source from which union funds are obtained; the places at which union funds are on deposit; and a list of those organizations to which the union has contributed within the past 12 months. And bring with you also records showing names and addresses for all members of the United Professional Workers who are employed by the Federal Government of the United States of America, and records showing names and addresses of all members who are employed by any state, county, or municipal government located anywhere within the United States of America."

This subpoena had been prepared by the staff of the Subcommittee. The Subcommittee itself had not approved the subpoena or its contents by any formal action, and there is no evidence that the members of the Subcommittee had authorized its preparation informally. (See R. 54-61.)

The petitioner appeared before the Subcommittee on October 5, 1951. Only one member of the Sub-

committee, Senator Watkins, was present (R. 38). At the outset of the hearing, petitioner objected to the absence of a quorum. Senator Watkins ruled that one Senator constituted a quorum and stated that petitioner's objection would be noted on the record (R. 38-9).

The petitioner produced, as requested by the subpoena, records showing the amount, source, and place of deposit of the Union's funds and the organizations to which the Union had contributed during the preceding 12 months (R. 40-41). He answered orally all questions put to him concerning the Union, including questions on the nature of the Union, its method of operation, its activities, its finances, the total number of its members, and the agencies in which Union members were employed (R. 39-41, 43-46). His answers showed that the Union had approximately 35,000 members, of whom 5 percent were federal employees, and the remainder being employees of state, county and municipal governments, mostly the last (R. 43-44). The bulk of the members working for the Federal government were employed in the Bureau of Engraving, the Post Office, and the Veterans' Administration (R. 43). The petitioner further explained that since the Union consisted of government employees, it did not have bargaining rights as did unions in private industry; instead, the Union handled grievances for its members and appeared at wage hearings before budget commissions or before legislative bodies on legislation affecting government employees (R. 44-5).

The petitioner objected, however, to that portion of the subpoena which called for the production of the names and address of all of the members of the

Union. He argued that the request for the names was improper invading "the rights of unions to the privacy of their membership records" (R. 41). He stated (R. 42):

> "Every individual who joins a union joins it with the confidence and trust supported by tradition and law that the act of joining and maintaining membership is a personal right and freedom that is inviolate. A request such as the present constitutes a wholesale invasion of such privacy and the 'right to be let alone' which is protected by the fourth amendment. Every trade-union member imposes a special trust in his union officers to protect and preserve that right. Therefore, to submit to the request in this subpoena would be a violation of the trust imposed in me by my membership and a betrayal of the entire trade-union movement in this country. I have no doubt that not a single union president would find it possible to comply with such a request.
>
> "I am confident that the members of this committee, after considering my views and after a study of the full implications of the request made in this subpoena, will realize its conflict with the basic union tradition of this country now incorporated into Federal law and withdraw the demand for membership lists."

After some colloquy, Senator Watkins stated to the appellant: "You are directed by the committee to produce those records according to the terms of the subpoena." (R. 47).

The petitioner immediately asked for reconsideration. He said (R. 47): "Again I plead with the chairman and with the committee to reconsider the entire matter, because I think you are infringing on a right that workers in America have, including Federal em-

ployees". Senator Watkins stated (R. 48): "I do not think any court would ever resolve itself against the United States finding out what organization its members belong to." (R. 48-9).

In reply to a question by the Subcommittee's counsel, the petitioner said that he could prepare the information called for in a week (R. 49). The counsel then said, "I respectfully suggest to the chairman that the witness be ordered to produce the information and transmit it to the subcommittee in 10 days' time." Senator Watkins immediately said to the petitioner, "Since you have made the reply that it could be done in a week, that will be the order of the committee, that you submit that information as requested by counsel for the committee within 10 days from this date. The record will show that you of course have been given that notice and that requirement has been made, and the order has been made" (R. 49).

The petitioner again asked for reconsideration. He said (R. 49): "I would like to suggest to the committee to reconsider that. I think you ought to consider it in the light of the facts that organized labor in America will recognize in this a break in the wall that they have built up over half a century against the initiation of blacklists. I don't think that these lists can be looked upon in any other light than as blacklists." The discussion was concluded with this final exchange (R. 50):

> "Mr. Arens: Will you produce it pursuant to the order of the chairman of this session within 10 days from today?
>
> Mr. Flaxer: I will have to take that under consideration.

> Senator Watkins: That is the order, and of course, we will have to take whatever steps are necessary if at the end of the time you have not produced them."

At the trial, Richard Arens, counsel for the Subcommittee, testified that the Subcommittee had information that the petitioner, the Union's Secretary-Treasurer, its former Negotiations Director, and "certain" members of its executive board, were members of the Communist Party (R. 51-53). Neither Arens nor any other witness gave any testimony as to what was the subject under inquiry or the pertinency of the membership list of the Union to any subject. Nor is there any evidence in the record of why the Subcommittee wished the names and addresses of the 35,000 union members or what use it intended to make of that information.

The court below stated in its opinion that "the subcommittee decided to conduct an investigation as to whether [the Union's] membership was infiltrated by [Communists]." (App. B, p. 2) There is, however, no evidence in the record to this effect.

Having thus conjectured a subject matter for the inquiry, the court below held that the membership list was pertinent to the conjectured subject because "the names could be used to check against a list of subversives to determine the extent of infiltration into the union." (App. B, p. 9) There is no evidence in the record however that such was the Subcommittee's purpose or, for that matter, that the Subcommittee or any other agency of government possesses a master list of "subversives."

REASONS FOR GRANTING THE WRIT

1. This case involves the most extreme assertion of the legislative inquiry power which has yet been made. A major question arises as to whether the court below has discarded recognized limitations on the inquiry power.

Never before has a labor union officer been convicted for refusing to produce to a Congressional committee the membership lists of his union. Never before, so far as we have been able to ascertain, has a committee made such a sweeping demand.

The Subcommittee's unprecedented subpoena sought to invade the privacy of the 35,000 individuals who were members of the Union. These were to be stigmatized by being listed in the archives of a committee operating in the area of internal security, and were thereby to be ever subject to being slandered at some crucial point in their affairs.[1] The Committee's subpoena also infringed the hard-won tradition of the American labor movement that labor unions may not be required to divulge the names of their members.

This intrusion into private matters was not supported by any showing of a legislative purpose and of pertinency to a matter under inquiry, although such a showing is a prerequisite to a conviction for obstructing a legislative investigation. *Quinn* v. *United States*, 349 U. S. 155, 161; *Sinclair* v. *United States*, 279 U. S. 263, 296-7; *Kilbourn* v. *Thompson*, 103 U. S.

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[1] Cf., the recent episode involving Attorney General Javits of New York, who was attacked on the basis of information in the possession of this same Subcommittee on the eve of his nomination as a Republican candidate for the United States Senate.

168. The decision below can not be reconciled with the holding in *Sinclair* that in a contempt case the government has the burden of proving pertinency to an authorized purpose.

The court below held that the Subcommittee desired to match the names of the union members against a list of "subversives" in order to determine whether the Union had been infiltrated by "subversives." This holding was unsupported conjecture. Nothing of the sort was suggested by the Subcommittee or by the government's evidence. The only evidence which had any conceivable bearing on the subject of the inquiry was testimony that the Subcommittee had information that union officers were Communists. This fails to establish any legitimate purpose or use for the names of the 35,000 union members, nor does it support the court's remarkable supposition that the Subcommittee has a master list of the "subversives" in the American population.

If a legislative purpose, no matter how fantastic, may be conjectured by the appellate court for any demand, no matter how extravagant, the principle that Congressional investigations must have a legislative purpose becomes merely a paper requirement. Yet this has now occurred for the jurisdiction in which most Congressional investigations are held and in a period when abuse of the inquiry power is most prevalent. See Barth, *Government by Investigation* (1955); Taylor, *Grand Inquest* (1955), especially c. IV; Chafee, *The Blessings of Liberty* (1956) p. 221; *United States* v. *Rumely*, 345 U.S. 41, 44.

In *Quinn* v. *United States*, *supra*, at 161, this Court recently said: "The power to investigate, broad as it

may be, is also subject to recognized limitations. It cannot be used to inquire into private affairs unrelated to a valid legislative purpose. Nor does it extend to an area in which Congress is forbidden to legislate. Similarly, the power to investigate must not be confused with any of the powers of law enforcement; those powers are assigned under our Constitution to the Executive and the Judiciary." The limitations stated by *Quinn* have now been eliminated by the court below. The court has also repudiated the admonition in *Sinclair* v. *United States, supra,* at 292, that "it is well to remember that few, if any, of the rights of the people guarded by fundamental law are of greater importance to their happiness and safety than the right to be exempt from all unauthorized, arbitrary or unreasonable inquiries and disclosures in respect of their personal and private affairs."

2. If the court below could supply by conjecture a purpose for the Subcommittee's demand, a major question arises as to whether this was a valid legislative purpose.

By the lower court's reasoning, the Subcommittee has power to subpoena the names and addresses of the one and a half million members of the Teamsters Union, of the million members of the United Automobile Workers, and, for that matter, of almost any organization. For it can always be speculated that the Subcommittee desires to check the names of the organization's members against its master list of "subversives."

In this case, it is true, the Subcommittee had derogatory information about some of the organization's leaders. But if such a foundation is necessary, it is

under current conditions, child's play to supply it, particularly for a Subcommittee which can develop derogatory security information about a Republic Attorney General of New York.

The fact that the petitioner's Union was composed of government employees is of no consequence, since that factor was not relevant to the court's theory of pertinency (the Subcommittee, as we have shown, had no theory at all, or if it did, failed to disclose it). In any event, 95% of the members were employed by state, county and municipal governments, and, absent some showing of federal interest, were presumably outside the scope of federal control or regulation. See *Newton* v. *Commissioners*, 100 U. S. 548, 549; *Kentucky* v. *Dennison*, 65 U. S. 66, 107; *Wilson* v. *North Carolina*, 169 U. S. 586, 594; *Florida* v. *United States*, 282 U. S. 194, 211-2.* If production of the membership lists of this Union can be compelled on the theory of the court below, then the membership lists of any union are subject to the same demand.

The importance of this case to the American labor movement as a whole is therefore apparent. This has been recognized in comments condemning the action

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* Even if it be assumed that the Subcommittee was justified in demanding the names and addresses of the members of the Union who were federal employees, the conviction on both counts must be reversed unless the Subcommittee was also justified in demanding the names and addresses of union members employed by state, county and municipal governments. Both demands were contained in one subpoena, and the petitioner cannot be found guilty of contempt for refusal to comply with the subpoena if any part of it was bad and called for matters not within the authority of the Subcommittee. *Bowman Dairy Co.* v. *United States*, 341 U. S. 214, 221; *United States* v. *Patterson*, 206 F. 2d 433.

against petitioner in editorials appearing in the May, 1952 issue of the *Catering Industry Employee*, official journal of the Hotel and Restaurant Employees and Bartenders Industrial Union, in the July 1952 issue of the *Carpenter*, official journal of the United Brotherhood of Carpenters and Joiners, and in a statement of policy issued by the Executive Board of United Packinghouse Workers of America, *The Road Ahead*, April 1953. These unions saw the issue in this case as follows:

> "The issue is this: do unions have the right, as the courts have repeatedly held, to hold their membership lists in privacy?
>
> "I think they do. I hope others will join me in speaking out in defense of that right before it is too late." (*Catering Industry Employee.*)
>
> "The right of privacy is something it took organized labor generations to achieve. It is something unions must maintain if the blacklist, labor spying and all the evils of fifty years ago are not to be brought back." (*Carpenter.*)
>
> ". . . In his recent contempt conviction for refusing to turn his union membership lists over to a Congressional investigating committee Abram Flaxer of the United Public Workers was supporting a principle on which any trade union leader would face jail rather than betray his trust." (Packinghouse Workers statement.)

Whether a Congressional committee has power to demand the membership lists of unions is surely an important constitutional question, involving not merely the scope of the inquiry power generally, but also the First, Fourth and Fifth Amendments. Serious constitutional questions are also raised by the holding below that a legislative committee has authority to compile a list of "subversives" and thereby to justify

an insatiable demand for names to check against the list. Nothing in the Constitution sanctions such a compilation, and the First and Fifth Amendments and the bill of attainder clause prohibit it.

3. This case also involves an important question, never decided by this Court, as to what constitutes a quorum of a Senate committee for the purpose of ruling on objections to a subpoena duces tecum.

Under the Senate Rules, at least one-third of the membership of a committee or subcommittee is necessary to constitute a quorum for the "transaction of business," except that a lesser number may be fixed by the committee or subcommittee "for the purpose of taking sworn testimony." See *supra*, pp. 4-5. The lesser number fixed by the Subcommittee here involved is one Senator (R. 34). The question here is whether the smaller quorum authorized only to take sworn testimony is authorized to rule on objections to a subpoena duces tecum.

In the present case, a single Senator presided at the Subcommittee hearing at which petitioner appeared. He overruled petitioner's objection to the absence of a quorum, and, without consultation with any other members of the Subcommittee, overruled his objections to the production of the 35,000 names and addresses of members of his union.[4]

Three of the seven judges of the court below agreed that a full quorum was necessary to rule on petitioner's objections, and that therefore petitioner was not guilty of contempt, his objections not having been validly

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[4] The contents of the subpoena had not been considered by a full quorum of the subcommittee prior to its issuance, see *supra*, p. 6.

overruled, as required by *Quinn* v. *United States*, *supra*.

The Senate Rule, if read literally, sustains the dissents and petitioner's contention, since the authority of the smaller quorum is limited to the taking of sworn testimony. Furthermore, the legislative history supports a strict construction of the authority of a smaller quorum. The provision for a smaller quorum, made by a recent amendment to Rule XXV, (Sen. Res., 180, *supra*, p. 5) was designed to meet the specific situation created by *Christoffel* v. *United States*, 338 U. S. 84, and its sole purpose was to eliminate a defense of no-quorum to a perjury charge. It was not intended otherwise to enlarge the authority of the smaller quorum. The Report on the Resolution which provided for the smaller quorum stated: (Sen. Rep. 1208, 81st Cong. 2d Sess., p. 1):

> "Adoption of Senate Resolution 180 is intended to meet the problems raised by the Supreme Court's decision [in *Christoffel* v. *United States*, *supra*] by authorizing each Senate committee and subcommittee hereafter to fix the number of its members which shall constitute a quorum for the purpose of taking sworn testimony. The resolution does not otherwise change the existing requirements pertaining to committee quorums contained in the Senate Rules or in the Legislative Reorganization Act of 1946."

Senator Hayden, who managed the Resolution on the Senate floor for the Committee on Rules and Administration, advised the Senate (96 Cong. Rec. 1284):

> "Mr. President, this resolution is designed to take care of the question of a quorum being present in committees when sworn testimony is to be

taken and perjury may be committed. It is to prevent perjury."

Later Senator Hayden stated (*ibid.*): "The resolution merely has to do with the procedure before committees in order to cover the question of perjured testimony."

Standard rules of construction also require that the provision for a smaller quorum, being stated as an exception to a general rule, be construed strictly, so as to avoid having the exception nullify the rule. *Schlemmer* v. *Buffalo R. & P.R. Co.*, 205 U.S. 1, 10; *Piedmont & Northern Ry. Co.* v. *I. C. C.*, 286 U.S. 299, 311-2; *United States* v. *Dickson*, 1 Pet. 141, 165; *United States* v. *Scharton*, 286 U. S. 518, 521-2.

Many of the abuses of the investigative power have been laid to the use of one-man subcommittees. See Barth, *op cit. supra*, pp. 203-4. The decision below extends to such one-man subcommittees, contrary to the Senate Rules, the power to insist on the production of records and documents, no matter how serious are the policy questions involved. Here a single Senator insisted on a demand which had never before been made by a body of the Congress and which affected 35,000 individuals. As Chief Judge Edgerton pointed out in his dissent, a full quorum "might have accepted appellant's view that the subpoena was invalid. Even if it had not accepted that view, it might have concluded that numbers of union members, not their names, were all that the committee needed, and might therefore as a matter of policy have withdrawn the demand for names." (App. B, p. 18).

Certiorari should be granted to determine whether such sweeping authority has actually been committed to one-man subcommittees.

4. This case involves an important question on the applicability of the *Quinn* doctrine of the necessity of a direction. The petitioner, after objecting to the validity of the subpoena, was directed by the sole Senator present to produce the list of names and addresses of union members. He continued to object, asking for reconsideration of this ruling, and as a result was ordered to produce the documents not on that date, but ten days later. The majority below held that he was guilty of contempt on October 5th, the date of the hearing[4] thus making irrelevant Senator Watkins' extension of the subpoena date for production. Judges Edgerton and Bazelon held that under *Quinn* it was necessary to examine the entire proceedings, and that the issue of direction must be resolved on the basis of the final ruling made on petitioner's objections, and not on the basis of an intermediate ruling.

The minority view is clearly the only tenable one under the *Quinn* doctrine. A witness is not "clearly apprised that the committee demands his answer notwithstanding his objections" (*Quinn* at 166), on the basis of a direction made in the course of a colloquy which is altered at the end of further discussion. A witness can only reasonably conclude that he should be guided by the last words of the committee and not by its earlier statements. Indeed, this Court in *Quinn* (at 166, ftn. 34) cited with approval the decision and opinion of the District Court in *United States* v. *Kamp*,

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[4] The majority agreed with the petitioner's contention that under the indictment and under the case as tried, petitioner was either guilty of contempt on October 5th or not at all, and that the issue of the production or non-production of the list of names after October 5th was not in the case (See App. B. pp. 5-7).

102 F. Supp. 757, in which the defendant was acquitted of contempt on the basis of a colloquy between the defendant and the committee, substantially identical to that which occurred here.

CONCLUSION

This case involves important and novel questions which have been decided by a four to three vote in a manner inconsistent with important principles established by this Court. The importance of the case was recognized by the court below, which took the unusual step of ordering on its own motion a rehearing in banc, thus removing the case from a division the majority of whom voted to reverse the conviction. Certiorari should be granted.

Respectfully submitted,

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